

***United States Court of Appeals
for the Second Circuit***



AMICUS BRIEF

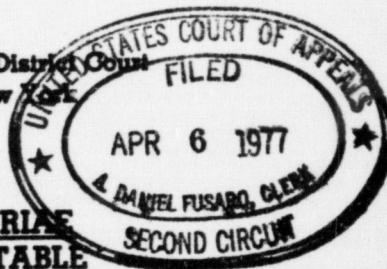
No. 77-6049

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

SECRETARY OF THE INTERIOR, ET AL., *Appellants*
v.
COUNTY OF SUFFOLK, ET AL., *Appellees*

On Appeal From The United States District Court
For The Eastern District of New York

BRIEF OF AMICUS CURIAE
THE BUSINESS ROUNDTABLE



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BRIEF OF AMICUS CURIAE
THE BUSINESS ROUNDTABLE

I. INTEREST OF AMICUS CURIAE

This brief is submitted on behalf of industrial energy users who have a vital interest in the prompt development of domestic energy supplies.

The Business Roundtable, a voluntary association of major corporations from many industries and sectors of the economy,¹ has, as a basic purpose, the development and expression of policy recommendations on significant busi-

¹ A list of the membership of The Business Roundtable is attached as Appendix A to the Motion for Leave to File Brief *Amicus Curiae*, filed herewith.

ness, economic and social issues confronting the nation as a whole. The Roundtable is one means by which business leadership can speak to problems which transcend regional and individual economic interests.

The case now before the Court poses just such a problem.

At issue is a major component of the national effort² to solve the long-standing, ever more critical shortage of domestic fossil fuel energy.³

To the Roundtable, an equitable—and prompt—resolution of the issue here presented is of critical importance. The various lines of economic activity in which the members of The Roundtable engage—whether it be mining, manufacturing, transportation, finance, sales, communications or other lines of endeavor—depend, in whole or in part, on a stable supply of energy.⁴ If primary fossil fuel

² Exhibit "G," "Effects of Offshore Oil and Natural Gas Development on the Coastal Zone," Library of Congress Congressional Research Service Study for the use of the Ad Hoc Select Committee on Outer Continental Shelf, U.S. House of Representatives, March, 1976, 94th Congress, 2nd Session.

³ The Federal Energy Administration's "Monthly Energy Review," February 1977 (NTISUB/127-002) reflects the following:

"The United States produced 60.0 quadrillion Btu of energy (the equivalent of 28.3 million barrels per day of crude oil) during 1976, down 0.4 percent from the level for 1975. . . . Average daily crude oil production fell 2.8 percent, Natural Gas output declined 1.3 per cent in 1976

"Domestic consumption of energy during the first 11 months of 1976 was 66.8 quadrillion Btu (the equivalent of 34.4 million barrels per day of crude oil), 4.3 percent greater than consumption during the similar period of 1975. . . .

"U.S. imports of fossil fuels during 1976 set a record high of 16.6 quadrillion Btu (or 7.8 million barrels per day of crude oil equivalent), an increase of 19.5 percent from the 1975 level Imports of crude oil were 28.8 percent higher in 1976, refined petroleum products, 4.5 percent higher, and natural gas, 1.8 percent higher. . . ."

⁴ In October, 1976, the last month for which figures are available, the industrial sector consumed 1.481 quadrillion Btu in the form of natural gas and petroleum, while transportation accounted for 1.585 quadrillion Btu. This consumption compares with .981 quadrillion Btu in the form of natural gas and petroleum used in the residential/commercial sector in October 1976. FEA, "Monthly Energy Review," February 1977, pp. 47-49.

energy is not available, the productive business of the members of The Roundtable comes to a halt. American business cannot provide jobs, nor goods, nor services, without energy.

The Roundtable has witnessed, with growing concern, the developing shortage of domestically-produced oil and gas, and the concomitant rise in imports of foreign fuels.⁵ The political risk of dependence on imported fuels is substantial; the economic risk to the nation is incalculable. *If* foreign powers will export to us what we must have in oil and natural gas to keep our people productively employed, the price extracted for these supplies may spell disaster for American industry.⁶

Imports of primary energy are a present fact of life. But The Roundtable would respectfully submit that the trend to higher import levels, at higher prices, must be reversed. If we continue as we now go, economic survival may not be possible.

What must be done can be done by concurrent action on two fronts: By maximum voluntary conservation efforts whereby nonproductive and wasteful consumption is curbed; and by maximum production efforts whereby increased supplies of domestic oil and natural gas are brought to industrial users as the raw material to keep the

⁵ "U.S. Dependence on Petroleum Imports has increased markedly since 1970, when imports constituted 21 percent of domestic petroleum requirements. During the first 3 quarters of 1976, imports accounted for 41 percent of petroleum demand. Dependence on imports from Arab countries has increased at a more rapid rate, from 3 percent of demand in 1970 to 16 percent during the first 3 quarters of 1976." FEA, "Monthly Energy Review," January 1977 (NTISUB/C/127-001), p. 49.

⁶ The November 1976 refiner acquisition cost of imported crude oil was \$13.58/bbl., compared with a cost of domestic crude of \$9.16/bbl. FEA, "Monthly Energy Review," February 1977, NTISUB/C/127-002. The cost of imported crude oil has escalated sharply over the past four years, with continuing increases threatened.

economy alive.⁷ Neither course of action, by itself, will do the job. Both are necessary.

Prompt exploration of the potential energy supplies lying offshore under the tracts leased in OCS Sale No. 40 (Mid-Atlantic) is an essential first step in avoiding greater dependence on imported fuels. The Roundtable would underscore the Congressional finding that there is an acute need "to encourage new . . . oil and natural gas production . . . from the Nation's Outer Continental Shelf . . . [as a step towards] attainment of a greater degree of energy self-sufficiency. . . ."⁸ This, we agree, is "a recognized national objective of the highest importance and priority."⁹

The critical need to proceed with Sale No. 40 is known to this Court. In its August 16, 1976 Order granting a motion to stay Judge Weinstein's preliminary injunction, the Court held:

"... [T]he national interests looking toward relief of this country's energy crisis, will be clearly damaged if the proposed sale is aborted."¹⁰

Axiomatically, if holding the *sale* was critical, exploration and development of OCS resources under the leases issued in the sale are critical.¹¹

⁷ "Maximum production" need not, of course, cause destruction of the environment. Appropriate and reasonable environmental safeguards are essential to the quality of life we all seek for ourselves and our children; but we cannot, and must not, equate environmental protection with a prohibition against energy exploration and production activities. If we so err, we risk destruction of America's economic fabric—at the far greater cost to the total environment which recession, depression and massive unemployment will inflict.

⁸ Report of the Committee of Conference, No. 94-987, June 24, 1976, p. 23, reporting on the 1976 Amendments to the Coastal Zone Management Act.

⁹ *Id.*

¹⁰ Order, No. 76-6122, August 16, 1976, p. 2.

¹¹ To date, there are no proved reserves of oil or natural gas on the Atlantic

The Roundtable has a vital interest in the outcome of this litigation. Its members, individually and in the aggregate, are very substantial users of energy; they are dependent upon energy. The invalidation of Sale No. 40 affects—materially, directly and adversely—the members of the Roundtable, as indeed it affects every energy consumer in this nation. In formulating his order, Judge Weinstein ignored the interests of the consuming public¹² and the principles of equity. In this he erred.

II. ISSUE PRESENTED

Whether, assuming a NEPA violation, the district court erred in purporting to void the Sale 40 leases and in enjoining all “further proceeding” on the Sale 40 project when less sweeping remedies would have been fully sufficient to prevent any environmental harm from the deficiencies perceived by the district court in the environmental statement.

III. ARGUMENT

The Roundtable fully supports the position of appellants that the Sale 40 Environmental Impact Statement (EIS) is in conformance with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*, and that no violation of NEPA has occurred. However, even assuming, *arguendo*, that the alleged deficiencies in the EIS are found by this Court to constitute violations of NEPA, none of those deficiencies would warrant the catastrophic remedy

OCS. The *potential* reserves are, however, enormously significant and must be explored. See Exhibit G, Congressional Research Service Report on the OCS, at pp. 2, 4-8, 25-33.

¹² The trial court's “Final Memorandum and Order” discusses equitable considerations affecting the issuance of an injunction in Part II “Remedy”. (Slip op. at 83-95). No mention of the consumer's interest in domestic supplies of oil and gas appears.

of voiding the leases¹³ and enjoining all further activities pursuant thereto, as ordered by the district court in this case.

A. The District Court Was Required To Fashion An Appropriate Order In Accord With Established Equitable Principles.

If anything is clear in the thicket of often-conflicting precedents surrounding NEPA, it is that sound equitable principles are to guide the courts in formulating remedies for NEPA violations. As Chief Justice Burger counseled in *Aberdeen & Rockfish R. Co., et al. v. Students Challenging Regulatory Agency Procedures*, 409 U.S. 1207 (1972):

"Our society and its government instrumentalities, having been less than alert to the needs of our environment for generations, have now taken protective steps. *These developments, however praiseworthy, should not lead courts to exercise equitable powers loosely or casually whenever a claim of 'environmental damage' is asserted.* The world must go on and new environmental legislation must be carefully meshed with more traditional patterns of federal regulation. The decision-making process for judges is one of *balancing*, and it is often a most difficult task." *Id.* at 1217-18 (emphasis supplied).

The court below properly recognized that "general principles and powers of equity jurisdiction are applicable" to NEPA cases, relying upon *City of Romulus v. County of Wayne*, 392 F. Supp. 578, 594 (E.D. Mich. 1975); *Environmental Defense Fund v. Froehlke*, 348 F. Supp. 338, 356 (W.D. Mo. 1972), *aff'd* 477 F.2d 1033 (8th Cir. 1973); and *East 63rd Street Association v. Coleman*, 9 ERC 1193 (S.D.N.Y. 1976).¹⁴ (Slip. op. at 87). Unfortunately, how-

¹³ The Roundtable also agrees with appellants' position that it was beyond the power of the district court to void the leases resulting from Sale 40.

¹⁴ To the same effect are *Morgan v. U. S. Postal Service*, 405 F. Supp. 413, 424 (W.D. Mo. 1975) ("general principles of equity are applicable in NEPA cases") and *City of South Pasadena v. Volpe*, 418 F. Supp. 854, 864 (C.D.

ever, it did not apply such principles in fashioning its order.

The Supreme Court explained, in *Hecht Co. v. Bowles*, 321 U.S. 321 (1944), that:

"The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." *Id.* at 329.

"The sole function of an action for injunction is to forestall future violations [and is] unrelated to punishment" for past actions. *United States v. Oregon State Medical Society*, 343 U.S. 326, 333 (1952).

In a NEPA case, Judge Friendly of this court has stated,

"we sit as a court with equity powers, and as such

'may adjust relief to the exigencies of the case in accordance with the equitable principles governing judicial action. The purpose of judicial review is consonant with that of the administrative proceeding itself,—to secure a just result with a minimum of technical requirements.'

Ford Motor Co. v. NLRB, 305 U.S. 364, 373, 59 S. Ct. 301, 83 L. Ed. 221 (1939). See also *Addison v. Holly Hill Fruit Products*, 322 U.S. 607, 619-22, 64 S.Ct. 1215, 88 L. Ed. 1488 (1944)." *City of New York v. United States*, 337 F. Supp. 150, 163-64.

Application of such equitable principles to NEPA actions has frequently required that the courts refuse to enjoin important federal projects. For example, this Court has recently noted, in *Vermont Natural Resources Council Inc. v. Brinegar*, 508 F.2d 927 (2d Cir. 1974), that

"where the equities require, it remains within the sound discretion of a district court to decline an in-

Calif. 1976) ("nothing in NEPA restricts a court from exercising its equity powers to fashion a decree meeting the needs of a particular case before the court").

junction, even where deviations from prescribed NEPA procedures have occurred." *Id.* at 933-34.

The Court went on to affirm the district court's refusal to enjoin construction of the Sleepers River interchange. *Id.* at 934. See also *Greene County Planning Board v. FPC*, 455 F.2d 412, 425 (2d Cir. 1972); *Environmental Defense Fund v. Froehlke*, 473 F.2d 346, 356 (8th Cir. 1972); *Concerned About Trident v. Rumsfeld*, 9 ERC 1370, 1382 (D.C. Cir. 1976); *Committee for Nuclear Responsibility v. Seaborg*, 463 F.2d 796, 798 (D.C. Cir. 1971), *applic. for inj. denied*, 404 U.S. 917 (1971); *Cape Henry Bird Club v. Laird*, 359 F. Supp. 404 (W.D. Va. 1973), *aff'd* 484 F.2d 453 (4th Cir. 1973); *Minnesota Public Interest Research Group v. Butts*, 358 F. Supp. 584, 627 (D. Minn. 1973), *aff'd* 498 F.2d 1314 (8th Cir. 1974) ("NEPA violations do not require the issuance of an injunction"); *Morgan v. U.S. Postal Service*, *supra*, 405 F. Supp. at 424 ("Congress did not create an absolute right to injunctive relief for violations of NEPA"); *City of South Pasadena v. Volpe*, *supra*, 418 F. Supp. at 864 ("there is no automatic right to an injunction under . . . NEPA").¹⁵

Even those courts which have found some injunctive relief to be warranted have frequently recognized that sound equitable principles required something less than a blanket injunction against all future activity related to the project. The result has generally been a partial injunction, permitting essential work on the project to continue. Thus, for example, in *State of Ohio ex rel. Brown v. Callaway*, 497 F.2d 1235 (6th Cir. 1974), the district court had found that the EIS was inadequate but that "appellant had not established that it was likely to succeed in compelling abandonment of the project." *Id.* at 1241. The district court further determined that a blanket injunction would cause substan-

¹⁵ To the same effect are *Daly v. Volpe*, 326 F. Supp. 868 (W.D. Wash. 1971); *Sansom Committee v. Lynn*, 382 F. Supp. 1242, 1245 (E.D. Pa. 1974); *Lee v. Resor*, 348 F. Supp. 389, 396 (N.D. Fla. 1972).

tial harm to three contractors already engaged to participate in the construction and that partial execution of those contracts could be permitted without "significantly or irreparably alter[ing] the natural environment of the project areas." *Id.* Holding that "the determination that an EIS is inadequate does not divest a court of discretion to permit specified further project activity," the court of appeals affirmed the lower court's order permitting the three contractors to continue work on a dam. *Id.* at 1240-41.

In *Environmental Defense Fund Inc. v. Armstrong*, 352 F. Supp. 50 (N.D. Calif. 1972), *aff'd* 487 F.2d 814 (9th Cir. 1973), *cert. denied* 416 U.S. 974 (1974), the court found that "the substantial environmental impact which plaintiffs ultimately seek to fend off will not occur until the dam is actually closed in 1978 [then six years in the future]." 352 F. Supp. at 60. Moreover, it found that "no construction having any irreversible impact on the environment will occur prior to March 5, 1973", by which time the court expected to have determined whether the revised EIS which it had ordered was in compliance with NEPA. *Id.* On the other hand, it also found that a blanket injunction would "add significant additional costs to the project and delay its ultimate completion." *Id.* at 59. On the basis of these findings, the court entered a partial injunction, permitting work to continue on the dam while the defective EIS was supplemented.

Environmental Defense Fund Inc. v. Froehlke, *supra*, 477 F.2d 1033, is virtually indistinguishable from the *Armstrong* case. There the court found that "the river and life within it would not be harmed while the EIS was being completed and that only minimal environmental damage would be inflicted on the adjacent land during that period." *Id.* at 1037. On the other hand, it found that "substantial additional costs would be incurred by the defendants" if a full injunction were entered. *Id.* The appeals court then held that "not every violation of NEPA gives rise to

blanket injunctive relief" and affirmed the trial court's partial injunction permitting on-going construction, road and cemetery relocations, voluntary property acquisitions, and design contracts to continue. *Id.* at 1036. *See also Conservation Council of North Carolina v. Froehlke*, 473 F.2d 664, 665 (4th Cir. 1973) ("work in progress presently on the dam site, or in other areas where trees have been cut and land cleared" allowed to continue).¹⁶ The district court paid lip service to these principles (slip op. at 87), but then proceeded to ignore them in fashioning its remedy.

The decisions refusing to enjoin or only partially enjoining federal projects in the face of NEPA violations, have always been predicated upon the court's determination that the likelihood of environmental injury was outweighed by various other important considerations. For example, in *Daly v. Volpe*, *supra*, where the court found that there had been "substantial" but not "strict" compliance with NEPA procedures, it held:

"[I]njury to the community of North Bend and to the citizens of the state of Washington by further delaying construction of the highway, will far outweigh any injury plaintiffs might sustain by allowing defendants to proceed with this long-delayed project." 326 F. Supp. at 870-71.

Upon that basis, the court refused to issue an injunction.

In *Committee for Nuclear Responsibility v. Seaborg*, *supra*, the D.C. Circuit upheld a district court's refusal to enter a preliminary injunction against the Amchitka nu-

¹⁶ Other partial injunction cases include *Environmental Defense Fund v. TVA*, 339 F. Supp. 806, 812 (E.D. Tenn. 1972), *aff'd* 468 F.2d 1164 (6th Cir. 1972), *applic. for stay denied*, 414 U.S. 1036 (1973) ("work on land already cleared for road construction in Monroe County" and "work of the mapmaking and reporting employees" allowed to continue) and *Latham v. Volpe*, 455 F.2d 1111, 1122 (9th Cir. 1971) ("court-approved hardship acquisitions" of land allowed to continue). *See also Sadler v. 218 Housing Corp.*, 417 F. Supp. 348, 360 (N.D. Ga. 1976); *Jones v. HUD*, 390 F. Supp. 579, 592 (E.D. La. 1974).

clear test because of the government's assertions of "monetary damage from an injunction" and, even more importantly, because of its "assertions of potential harm to national security and foreign policy" which would have resulted from an injunction. 463 F.2d at 798.¹⁷ In *Sansom Committee v. Lynn*, *supra*, an injunction against demolition of an urban renewal area was refused because it was found that "inaction by the federal government or its agents poses an imminent threat to the public safety or welfare. . .". 383 F.Supp. at 1245. *See also Vermont Natural Resources Council Inc. v Brinegar*, *supra*, 508 F.2d at 937 (injunction would unduly delay the project, causing "heavy damage to defendants"; "impermissibly heavy traffic" in adjoining small town; and the loss of jobs provided by construction in an area of high unemployment).

B. The District Court Erred In Voiding The Sale 40 Leases and Enjoining All "Further Proceeding" On The Sale 40 Project.

Application of the legal principles discussed in the preceding section to the case at bar makes clear that the district court below erred in voiding the Sale 40 leases and enjoining all "further proceeding" on the Sale 40 project. This is so because, first, any possibility of environmental damage from the EIS deficiencies perceived by the district court could have been fully prevented by far less sweeping remedies and, second, the district court's present order would impose enormous injury on lessees, supporting industries, potential employees, energy consuming industries generally, and on the energy consuming public at large. Since other parties have amply demonstrated the economic and social injury that the lower

¹⁷ Cf. *People of State of California ex rel. Younger v. Morton*, 404 F. Supp. 26 (C.D. Calif. 1975):

"Dwindling domestic sources of oil and gas pose a definite threat to the American consumer and to industry. It is clearly in the national interest and in the interest of defense of the United States that our dependence on imported oil be minimized." *Id.* at 29 (emphasis supplied).

court's order will entail, we confine our attention here to the adequacy of the alternate remedies which were available to the lower court.

At the outset it must be understood that the environmental impact (if any) of the deficiencies perceived by the district court in the EIS would be felt only at the development and production phase of the Sale 40 project.¹⁸ The sole concern of the district court over environmental implications of the Sale 40 project had to do with the onshore development necessary to support offshore *production* of oil and gas. The district court's initial opinion makes clear that production is not expected from the offshore Atlantic area until 1979, at the earliest. (Slip op. at 51). Thus, the environmental harm upon which the district court opinion is based could clearly be prevented without voiding the Sale 40 leases and without enjoining preliminary exploration activities, which are the only activities presently possible or contemplated.¹⁹

¹⁸ Thus, the sole environmental concern of Part II-A of the lower court's opinion is that local government controls "could clearly lead to longer and more expensive pipelines or to the use of tankers [in delivering oil and gas to refineries and processing plants]". (Slip op. at 37). The court's own summary of Part II-B demonstrates that its focus is on the overstatement of oil and gas *production* and the understatement of *production costs*, "including pipeline construction". (Slip op. at 7). Part II-C of the opinion, dealing with the separation of exploration and development, is based on the court's belief that such separation "would allow government at all levels to exercise timely and essential controls over environmental, social and economic impacts, *especially those associated with onshore development*." (Slip op. at 60). The opinion makes clear that the onshore development referred to is that needed to support offshore production. Finally, Part II-D of the court's opinion is expressly concerned with "the onshore impact of choosing particular tracts rather than others". (Slip op. at 72). The subsequent text makes clear that the onshore impact about which the court was concerned was the impact of pipeline landfalls. (*Id.* at 72-73).

¹⁹ Indeed, if no oil or gas is ultimately found under the Sale 40 area, then the problems perceived by the district court with respect to pipeline landfalls and tankerage would evaporate.

1. *The Alternative of Requiring Supplementation of the EIS Without An Injunction.*

One alternative apparently never considered by the district court is that of ordering that the allegedly defective EIS be supplemented in certain respects, so as to rectify the perceived deficiencies, without entering any injunction. In *Cape Henry Bird Club Inc. v. Laird, supra*, which is closely analogous (in terms of the alleged EIS deficiencies) to the case at bar, the court required supplementation of the EIS in several respects because it believed "that the informational requirements of the statute have not been fully met", but refused to enjoin the project because "all the environmental aspects have been considered". 359 F. Supp. at 423. So here, the district court's first opinion specifically held that

"The evidentiary hearings in this Court have shown no reason to believe that the Secretary has failed to adequately consider such matters as protection of antiquities in the sea, migratory birds, fish and other wildlife, and water and air pollution problems. All are treated in great detail in the Sale 40 EIS and the EIS conclusion that no substantial problem exists was rational." (Slip op. at 22).

* * *

"[O]n balance, the impartial reader of the EISs is driven to the conclusion that, within the limit of reasonable researchers and writers, a studied effort was made to present a fairly grim picture of possible environmental difficulties. If anything, the studies are almost too detailed and encyclopedic for a lay executive to fully comprehend." (Slip op. at 31).

Thus here, as in *Cape Henry*, "all the environmental aspects have been considered". The purported deficiencies upon which the district court based its injunction were deficiencies in meeting the "informational requirements" of the statute. *Cape Henry* establishes that such deficiencies do not warrant an injunction.

Similar in its result is *Concerned About Trident v. Rumsfeld, supra*, in which the D.C. Circuit found that the Navy's NEPA statement for the submarine base at Bangor, Washington, satisfied NEPA "in all respects save two". 9 ERC at 1371. The Court held:

"As the Navy has taken no arbitrary or capricious action here but has attempted to comply in good faith with the mandates of NEPA, failing in only two instances, we do not believe that the issuance of an injunction pending the Navy's revision of the final EIS is necessary, especially since we have found that the Navy gave proper weight to environmental considerations in deciding to proceed with this strategically important project.

"The work on the Trident Support Site at Bangor, Washington may therefore continue. The case is remanded to the district court to afford the Navy an opportunity to correct the two deficiencies in the final EIS mentioned previously." *Id.* at 1382.

See also Lee v. Resor, supra, where no Environmental Impact Statement at all had been prepared, yet the Court declined to enter an injunction, holding that it had jurisdiction "to require the preparation of such a statement while the project continues." 348 F. Supp. at 397.

2. *The Alternative of Ordering A Supplemental EIS for the Developmental Phase.*

Another alternative clearly never considered by the district court is that of ordering a supplemental EIS for the developmental phase of Sale 40. Since the defects perceived by the district court in the Sale 40 EIS relate almost entirely to the alleged impacts of production and related onshore development, it would certainly have been logical for Judge Weinstein simply to have ordered that a new EIS be prepared at the developmental phase, covering the issues raised by those impacts.

It is abundantly clear, for example, that a sale-wide EIS, prepared before exploration has even begun and thus before any oil or gas has been found, cannot include a meaningful, site-specific discussion of proposed pipeline corridors. Such detail cannot come until later—when oil or gas has been located and the producers begin deciding upon methods for transporting those products to refineries and processing plants. See Brief of *Amicus Curiae*, Association for a Better New York, Inc., filed below on January 24, 1977. Cf. Anderson, *The National Environmental Policy Act*, in *FEDERAL ENVIRONMENTAL LAW* 362-63 (1974).²⁰ It therefore seems axiomatic that exploration should be permitted to proceed before environmental statements concerning proposed pipeline corridors are prepared.

Moreover, in a statement released on March 1, 1977 the current Secretary of the Interior has publicly promised "to require the preparation of an environmental impact statement prior to approving development plans for these [Sale 40] leases." Although the trial court did not have this statement before it, it did have Exhibit 19 (Technical Paper #1), in which USGS had specifically stated:

"Future pipeline corridor management planning studies would delineate specific pipeline corridors. Explicit in these future studies would be the informa-

²⁰ "Under this [proposed] approach, the first statement prepared would cover pending legislation or broad, new federal policies; statements to follow would be prepared as each distinct initiative in implementing the legislation or policy was formulated. The later statements would cover increasingly specific programmatic initiatives and impacts, and would refer back to the wider, policy-oriented statements for their treatment of far-ranging alternatives and basic federal policy."

"For instance, the alternative of flood-plain zoning could be exhaustively considered in an early comprehensive statement on the best way to manage a river basin; that alternative need not then be comprehensively reconsidered in statements on particular projects if the decision is made to construct a series of dams or river levees. The later statements could focus on localized impacts, without the agency's having failed to give the comprehensive, early environmental review called for by NEPA."

See also CEQ 1973 Guidelines § 1500.6(d)(1).

tion of an actual development production plan (both onshore and offshore). The establishment of any pipeline corridor would require the formulation of a development-production plan by industry and its thorough review by Federal, State, and local officials." *Id.* at 52.

In short, if it was not clear to the trial court (and it should have been), it is absolutely certain now that the Department of Interior is committed to prepare a subsequent EIS which will deal specifically with the developmental and production phases of the Sale 40 project, including pipeline corridor locations. This recognition further diminishes the need to enjoin the entire Sale 40 project because of the alleged deficiencies perceived by the lower court and militates in favor of the second alternative.

Allowing exploration to continue and requiring a supplemental EIS would, again, fully satisfy the NEPA concerns identified by the district court without causing the monstrous injury to lessees, their employees, and energy consumers which the blanket order inevitably entails.

* * *

A blanket injunction of the sort entered by the lower court is particularly inappropriate in the circumstances of this case. The leasing and subsequent exploration and development of the Outer Continental Shelf is a segmented program, readily subject to mid-course correction. As the Fifth Circuit noted in the MAFLA case:

"[I]n a project such as this where developers sign leases and conduct separable operations over a period of months and years, and where restrictions in those leases give the agency the ability to constantly control and adjust future action, this continuing control must be considered in determining the reasonableness of the impact statement. [Footnote omitted.] *The MAFLA sale is a unique form of federal action.* It does not involve a single undertaking or a project

which becomes a *fait accompli* the day the decision to proceed is made. Because it contemplates numerous, successive lessor-lessee relationships involving activities over many areas and over many years, the agency's continuing opportunity for making informed adjustments has a major effect upon our evaluation of the sufficiency of the materials contained in the EIS itself." *Sierra Club v. Morton*, 510 F.2d 813, 827-28 (5th Cir. 1975) (emphasis supplied).

The unusual segmentation of the OCS program suggests the particular propriety here of eschewing a blanket injunction in favor of narrower relief tailored to the particular problem perceived.

In any event, because the environmental impact which is the subject of the court's concern cannot occur for several years (until the development and production phases of the project), it is clear that there will be time enough to enter an appropriate injunction order at a later date, should the supplemental environmental statements be found inadequate.

The Court's assertion that "otherwise available alternatives" will be foreclosed if *any* Sale 40 activities are allowed to continue is naive. (Slip op. at 95-96). Presumably the Court's concern is that, should exploration reveal the presence of substantial reserves of oil or gas, the option of leaving such reserves in the ground would be foreclosed (or at least rendered substantially less attractive). However, given this country's need for oil and gas,²¹

²¹ Congress itself has spoken of "the urgent need for further exploration and development of the oil and gas deposits of the submerged land of the Outer Continental Shelf . . .". 43 U.S.C. § 1337. Moreover, "there are numerous recent statements by Congress and the Executive concerning the need for OCS development to diminish this country's dependence upon imported oil. [Citations omitted.]" *Alaska v. Kleppe*, 9 ERC 1497, 1501 (D.D.C. 1976). Even in this very case the lower court candidly found, in its first opinion:

"[A]s supplements to other resources, the Atlantic OCS reserves have substantial value in reducing projected oil and gas energy deficits. This is particularly true for natural gas since imports in the form of liquefied gas are just beginning and there is a lack of available gas at current prices from other parts of the country." (Slip op. at 6).

nondevelopment of any significant Atlantic reserves is not a feasible alternative. Such reserves, if they exist, will be developed sooner or later. Permitting exploration which may prove the existence of such reserves therefore forecloses no real alternatives; the real alternatives—tankerage versus pipelines and one pipeline corridor versus another—are in no way compromised by allowing exploration to continue.

In short, then, far less sweeping remedies were available to the court below and would have assured against the environmental harms which the court foresaw. The court's failure to select one of these less catastrophic remedies—or even to consider them—was therefore clear error.

IV. CONCLUSION

For the reasons set forth above—and for the additional reasons set forth in the briefs of appellants—The Roundtable respectfully urges that the blanket injunction entered by the district court be set aside.

Respectfully submitted,

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IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT
COUNTY OF SUFFOLK, Et Al.
Plaintiffs-Appellees

v.
SECRETARY OF THE INTERIOR, Et Al.
Defendants-Appellants

NATIONAL OCEAN INDUSTRIES ASSOCIATION, Et Al.
Intervenor-Defendants-Appellants
THE NATURAL RESOURCES DEFENSE COUNCIL, INC.
Plaintiff-Appellee

v.
SECRETARY OF THE INTERIOR
Defendant-Appellant

ON APPEAL FROM THE DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK
BRIEF OF NL INDUSTRIES, INC.
AS AN AMICUS CURIAE

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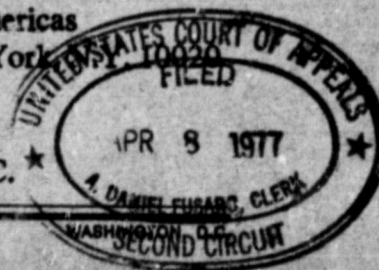


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Defendant-Appellant

**ON APPEAL FROM THE DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK**

**BRIEF OF NL INDUSTRIES, INC.
AS AN *AMICUS CURIAE***

I. INTRODUCTION

This case arises from the decision of the United States District Court for the Eastern District of New York (Weinstein, J., presiding) (the District Court) issued on February 17, 1977, in the above referenced cases which held that the Secretary of the Interior (Secretary) failed to comply with the National Environmental Policy Act (NEPA), 42 U.S.C. §4321 *et seq.*, in reaching his decision to lease certain outer continental shelf (OCS) lands in the mid-Atlantic region for the exploration and production of oil and natural gas. The District Court's decision (the Decision) postpones indefinitely any further exploration and development of the acreage leased by the Secretary at Lease Sale No. 40 (Sale 40).

As a significant consumer of refined petroleum products and natural gas, NL Industries, Inc. (NL) has a considerable interest in the expansion of the nation's critically short domestic energy supplies. The unusually cold weather of the past winter dramatically focused attention on the prospect of curtailment of natural gas for residential uses and brought home the grave extent of the natural gas shortage. NL, however, needed no reminder of gas curtailment. As an industrial consumer, NL has suffered steadily increasing curtailments for the past several years. Even under normal weather conditions, several of the major pipelines serving the East Coast were projecting significant curtailments of gas for *all* industrial uses. As evidenced by the experiences of the past winter, many industries are dependent upon natural gas and must close their plants when that fuel is not available.

Unfortunately, this winter was not an isolated hardship, but rather a preview of our future unless domestic petroleum and natural gas supplies are increased. While helpful, short-term measures such as the Emergency Natural Gas Act of 1977, Pub. L. 95-2 (February 2, 1977), will not solve the problem. The long-term energy supply problem can be eased only through conservation and increasing domestic energy supplies. Sale 40 is a good-faith effort by the Secretary to increase the nation's energy supplies while minimizing the environmental effects associated with that effort. With the *total* curtailment of gas for industrial uses, as experienced this winter, growing closer with each passing year, it is imperative that the natural gas and petroleum resources of the Atlantic outer continental shelf be developed without delay if gas dependent industries on the East Coast are to survive. Thus, NL seeks reversal of the decision below and has filed this brief in support of the Secretary as an *amicus curiae*.

II. STATEMENT OF THE CASE

NL is confident that the Secretary will adequately discuss the procedural history of Sale 40, the preparation of the programmatic environmental impact statement (programmatic EIS) and the site-specific EIS for Sale 40, the extensive public participation in that process and the procedural history of this specific litigation.¹ NL will not repeat this material. Suffice it to say that the only issue presented for consideration by the Decision is whether an adequate EIS was prepared for Sale 40. The questions of whether the nation's energy needs should be met by offshore leasing and production of hydrocarbons or by some other method and whether the Atlantic OCS or some other area should be leased were addressed in the programmatic EIS which was not found to be lacking. Indeed, the programmatic EIS has previously received judicial approval. *California v. Morton*, 404 F. Supp. 26 (C.D. Cal. 1975), *appeal pending*, No. 76-1431, 9th Cir. Thus, the issue in this case is whether the EIS prepared for Sale 40, which consists of the programmatic EIS and the site-specific EIS, met the requirements of NEPA.

The Decision held that NEPA was violated by the failure of the EIS:

- (a) to consider the impact of state and local exercise of regulatory power;
- (b) to make the proper cost-benefit analysis;
- (c) to evaluate separation of exploration and production leasing; and
- (d) to consider the impact of leasing alternative tracts.

NL will concentrate its comments on the errors of law made

¹ For purposes of this Brief, the parties will be referred to by their trial court designations or specifically identified as in "the Secretary."

by the District Court in first determining the proper NEPA requirements and then evaluating the Secretary's response to those requirements. Moreover, NL submits that even if the EIS may be said to be deficient in one or more essentially technical respects, the underlying policies of NEPA have been more than adequately met by the Secretary's actions herein. The District Court's decision to preclude further exploration and development of the Sale 40 leases is inappropriate and should be reversed as clearly erroneous and an abuse of discretion.

III. ARGUMENT

A. NEPA Does Not Require That The EIS For A Specific Project Consider The Environmental Aspects Of Related, But Separate Projects.

One of the initial problems in preparing any EIS is to determine the proper scope of the project for which the EIS is being prepared. Obviously, if the project and EIS are too narrow in scope, there is no realistic evaluation of the total environmental risk and the EIS must be rejected. *Natural Resources Defense Council v. Callaway*, 524 F.2d 79 (2nd Cir. 1975). It also is recognized, however, that by defining the scope of the project too broadly, the preparation of an EIS becomes either fruitless or impossible, thereby frustrating the NEPA objectives. *Indian Lookout Alliance v. Volpe*, 484 F.2d 11 (8th Cir. 1973). This problem is most often faced in situations where state governments seek Federal funding for relatively small highway construction projects which are parts of a larger highway construction plan. The question presented is whether the EIS should consider:

- (a) only the specific project for which funding is requested (the specific project); or
- (b) the specific project and other similar projects which are extensions of the specific project, are directly

affected by it and are planned for construction in the near future; or

(c) the entire projected highway of which the specific project is a small part; or

(d) the entire projected state or regional highway system of which (c) above is a part.

Although plaintiffs have consistently argued that NEPA requires an evaluation of the entire highway system or at least the specific highway involved, the courts with equal consistency have rejected these arguments in favor of option (b) outlined above. *Swain v. Brinegar*, 542 F.2d 364 (7th Cir. 1976); *Indian Lookout Alliance v. Volpe*, *supra*. Although certainly more complicated than highway planning, Sale 40 presents a similar problem with respect to the scope of consideration given to particular issues in the EIS. NL submits that the District Court too broadly defines the scope of the EIS required for Sale 40 and that this error is the foundation of the first NEPA violation cited in the Decision.

Although the first NEPA violation cited by the District Court is phrased in terms of a "failure to consider" the exercise of state and local regulatory power, it is clear from the Decision that the District Court's real complaint was that the Secretary's consideration of this matter was not specific enough to meet NEPA requirements. The District Court acknowledges at pages 15-18 of the Decision that the EIS considered the problems posed by the power of local authorities to control pipeline landfalls and the siting of other energy facilities. The District Court further acknowledges that the Secretary assumed pipeline transportation of any oil and gas discovered, made findings with respect to the potential number and size of pipelines which would be required and identified the potential landfall sites in general terms (the Decision at p. 24-27). The District Court's complaint is that the EIS (a) did not consider the opposition of

specific local communities to pipeline landfalls or other transportation related facilities (the Decision at p. 14), (b) did not consider "specific, pragmatic land-based obstacles to *transporting* ocean-bottom energy resources" (the Decision at p. 19, emphasis supplied), (c) did not propose specific pipeline routes and landfalls or discuss specific environmental problems associated with alternative pipeline routes (the Decision at p. 27, 32, 35), and (d) did not consider the effect state and local regulation could have on the cost of transportation (the Decision at p. 37). In sum, the District Court's complaint focuses on the *transportation* aspects of any oil and gas found as a result of Sale 40 and concludes that the EIS evaluation of these matters was not sufficiently specific.

NL submits that the approach taken by the Secretary is not only entirely proper under NEPA, but also will further the particular interests which the Decision seeks to advance. An understanding of the approach taken by the Secretary is founded upon the recognition that the methods and routes of transporting oil or gas are not to be determined by the lease sale. The activity for which the EIS was prepared was a *lease sale* which would permit, under conditions and terms approved by the Secretary, the exploration and development of certain tracts in the mid-Atlantic OCS. Thus, the primary environmental considerations are those associated with exploratory drilling and development *which must occur before a specific method of transporting the oil or gas is approved*. The routing of a pipeline is a related, but separate project requiring *separate* governmental approval and NEPA evaluation. See section 5(c) of the Outer Continental Shelf Lands Act, 43 U.S.C. §1344(c) (1964); 43 C.F.R. §2883.0-3 *et seq.*

In recognition of these facts, the Secretary deferred consideration of specific pipeline routing problems of the type envisioned by the District Court until such time as the existence and location of oil or gas deposits are known and

the construction of a pipeline has been proposed. The Secretary realized, however, that the act of leasing the acreage would most probably create a need for some form of transportation at a future date. Thus the EIS for Sale 40 evaluates the merits of tanker and pipeline transportation. See Sale 40 EIS, Vol. I, p. 15; Vol. II, p. 20-21 and Programmatic EIS, Vol. I, p. 60-63; Vol. II, p. 26-59. Since the leases require pipeline transportation whenever feasible as a measure to protect the environment, the EIS reasonably places more emphasis on this alternative. As related in the Decision, the EIS discusses the number and size of pipelines which might be needed, the environmental hazards associated with their use and installation and the probable routes in general terms. This is all that is required by NEPA.

The preparation of an EIS for any project is subject to the *rule of reason* which holds that:

an EIS is required to furnish only such information as appears to be reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well nigh impossible . . .

Natural Resources Defense Council v. Callaway, supra at p. 88.

In the context of the Mississippi-Alabama-Florida (MAFLA) offshore lease sale, the U.S. Court of Appeals for the Fifth Circuit applied the rule of reason to deny contentions identical to those adopted by the District Court with respect to the transportation issue. *Sierra Club v. Morton*, 510 F.2d 813, 823 (5th Cir. 1975). In *Sierra Club v. Morton*, the plaintiffs complained of the absence of an analysis of *specific pipeline locations* and the effect of pipeline leaks in *specific areas*. The Secretary had considered this issue in a *general* fashion and had retained the authority to require pipelines to be placed in special corridors. The consideration given pipeline transportation of oil and gas in this case has been

even more specific and detailed than that found suitable in *Sierra Club v. Morton*, and this Court should similarly reject plaintiffs' arguments.

The District Court essentially widened the scope of the Sale 40 project to include pipeline siting matters which will not be faced, if at all, for several years. By so doing, the District Court requires the Secretary to make a "crystal ball" inquiry which is not required by NEPA. *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 837 (D.C. 1972). The District Court suggests, for example, that the Secretary should consider the position of each of a large number of governmental units on the question of receiving pipelines or other energy facilities. This effort is mandated by the District Court despite the fact that no pipeline routing decision will be necessary for several years if at all. Any effort by the Secretary to evaluate local sentiments 4 years from now would be pure speculation. Nothing illustrates this point better than the action of the State of New York (New York) in this proceeding.

New York was initially a plaintiff in this proceeding, but prior to the final trial on the merits withdrew its participation. This action was publicly announced by Governor Carey who also expressed his support for the proposed oil and gas development because of the need for more energy in New York. This action illustrates that the attitudes of governments are subject to rapid change due to economic conditions, increasing energy shortages or simply election of new officials. With this type of shift possible at every local governmental unit, there is no meaningful method of analyzing the impact of local governmental attitudes on a transportation proposal to be made several years hence.

In general, there is nothing to be gained from an exercise in predicting specific pipeline routes at this time. It must be remembered that at present there is no assurance that oil or gas in commercial quantities will be found. Assuming

discoveries will be made, there is no indication as to total volume or the location of specific volumes within the large lease sale area. Any effort at route prediction, other than the general one made in the EIS, would be so highly speculative at this time as to be meaningless from the standpoint of protecting the concerns encompassed by NEPA.

By deferring consideration of pipeline routing until these factors are known, the Secretary has increased the realistic and meaningful input which can be made by local governments. Given the lead time for exploration and development, consideration of the need for specific pipelines or pipeline routes is at least one or two years away. If local coastal zone management plans are completed by then, the local communities will be in a much better position to participate in the pipeline right-of-way proceedings. By having a completed master plan of their own, the local communities will be able to evaluate specific pipeline route proposals with much more accuracy than they can at present. Thus, the Secretary's *deferral* of the consideration of *transportation specifics* is not only proper under NEPA, but beneficial to the locally affected communities.

To summarize, the District Court erred by finding that NEPA required detailed, specific consideration of the transportation issue in an EIS applicable to an action which would permit only exploration and development. The District Court has improperly defined the scope of the transaction. In terms of the analogy with which this section opened, the District Court requires an EIS on the entire highway system when only a small, easily segmentable portion is being considered for funding. In view of the rule of reason, courts have previously refused to read NEPA as requiring so broad a statement in both highway funding and offshore leasing cases. There is no basis for departing from this construction in the present case. The EIS adequately considered the environmental issues associated with

tanker or pipeline transportation that could reasonably be predicted to be required at some future date by Sale 40. This is particularly true where the specific routing of pipelines will be subject to a *separate* NEPA evaluation and environmental control by state, local and federal authorities. *Sierra Club v. Morton, supra* at p. 823-4.

B. NEPA Does Not Require The Cost-Benefit Analysis To Be As Mathematically Precise As That Required By The Decision.

The District Court's protestations notwithstanding, the Decision constitutes a substantive review of the basis for the EIS cost-benefit analysis. The District Court rejects completely the substantial evidence upon which the EIS cost-benefit analysis was made and adopts completely the evidence of plaintiffs' witness. Despite a thorough briefing of the deficiencies in plaintiffs' presentation by the defendants in their post-trial briefs, the Decision provides essentially no explanation of how these deficiencies were overcome by the plaintiffs except to say that the District Court found the plaintiffs' witness to be credible (Decision at p. 44-45). In light of the admitted failure of plaintiffs' witness to read portions of the EIS relevant to the cost-benefit analysis (Trial Tr. 1108), there is no basis in the record for the District Court's complete adoption of plaintiffs' evidence in lieu of that contained in the EIS.

This case presents good-faith differences between the estimates of experts in highly speculative areas, such as the cost of finding and producing oil and gas and reserve estimations in large *undrilled* frontier areas. A brutal reminder of this fact of life is provided by the recent experience of the companies which paid approximately 1.5 billion dollars in lease bonus payments to the U.S. government for the right to explore and produce the MAFLA lease sale acreage. *Sierra Club v. Morton, supra* at p. 817. After spending millions of additional dollars for exploratory drilling, activi-

ties involving the most important geologic structure in the area, the "Destin Dome," were abandoned as a failure when no oil or gas was found. For all practical purposes, the entire MAFLA lease sale was a "bust." This example demonstrates forcefully that mere differences in the estimates discussed in the Decision cannot render the Secretary's judgment to lease the acreage clearly erroneous. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

Moreover, assuming *arguendo* that the EIS cost and production estimates were incorrect by the percentages alleged by plaintiffs, there would be no NEPA violation. The District Court found that the Secretary's cost-benefit analysis of Sale 40 violated NEPA by overstating peak oil and gas production and understating the cost of production, including pipeline construction. The Court's rejection of the Secretary's cost-benefit analysis as "defective" on the basis of figures submitted by plaintiffs' witness misinterprets the purpose of the cost-benefit analysis under NEPA. Section 102(2)(C)(iv) of NEPA requires an analysis of "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity." 42 U.S.C. §4332(2)(C)(iv). However, the Act "does not demand that every federal decision be verified by reduction to mathematical absolutes for insertion into a precise formula." *Sierra Club v. Lynn*, 502 F.2d 43, 61 (5th Cir. 1974). NEPA requires only that the decision-maker consider uncertainties such as costs and production rates in sufficient detail to permit reasoned evaluation and decision. *Sierra Club v. Morton*, *supra* at p. 827.

The development of OCS oil and gas reserves has been the subject of widely varying cost and production estimates. As the Court of Appeals for the Fifth Circuit stated in upholding the EIS prepared by the Department of the Interior in a prior OCS lease sale:

However, every attempt to assign a dollar value to future effects of present actions necessarily involves prediction.

Such opinion estimates can be most precise when the systems involved are simple. As they become more complex and interactive, the ability to forecast becomes more a guess and less a prediction.

The MAFLA development is in the complex, interactive category.

Sierra Club v. Morton, supra at p. 827.

Under these circumstances, the use of cost and production estimates in the EIS prepared by the Secretary in the instant case, while permissible and desirable, is "not a *sine qua non*" under NEPA' *Sierra Club v. Morton, supra* at p. 827. Certainly it does not constitute a violation of NEPA if such estimates vary from those offered by other witnesses. The Secretary's good-faith cost and production estimates give the decision-maker and other readers enough detail concerning all costs and benefits to permit reasoned evaluation and decision and, thus, meet the requirements of Section 102 (2) (C) (iv) that long-term environmental costs be weighed against immediate benefits.

C. Since The "Alternative" Of Separating Exploration And Production Leasing Is Not A True Alternative, The EIS Treatment Of This Issue Was Proper.

The District Court found that the EIS did not satisfactorily evaluate several options for OCS leasing, such as government exploration and the separation of exploration and production leasing. In fact, the EIS discussed each of these options and rejected them due to budgetary, manpower and legal constraints (the Decision at p. 63-65). NL submits that this evaluation met the NEPA requirements.

It must be remembered that there is no need to consider alternatives which are speculative or could only be implemented by material changes in governmental policy or legislation. *Sierra Club v. Lynn, supra* at p. 62. The NEPA re-

quirement is one of "considering alternatives as they exist and are likely to exist." *Carolina Environmental Study Group v. U.S.*, 510 F.2d 796, 801 (D.C. Cir. 1975). Moreover, the discussion of valid alternatives need not be exhaustive. *Natural Resources Defense Council v. Morton*, *supra* at p. 837; *Sierra Club v. Froehlke*, 534 F.2d 1289 (8th Cir. 1976). This should be particularly true where the Secretary views the alternative as impractical due to legal constraints, as is clearly the case with the suggestion to issue leases that convey only a right to explore, but not produce. The EIS discussion meets this limited criteria. The alternatives were rejected for specific reasons set forth in the EIS. Since the agency's view as to the practical limits of its manpower, budgetary and legal resources is entitled to substantial deference by the courts, there is no basis for overruling the EIS findings on these issues. *Train v. Natural Resources Defense Council*, 421 U.S. 60, 87 (1975); *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

Moreover, the "alternatives" suggested in the Decision are not true alternatives to the exploration and development of the OCS and therefore, are not required to be considered in the EIS at all. The twin issues of Federal exploration of the OCS and separation of exploration and production leasing were suggested as alternatives by the plaintiffs in *Sierra Club v. Morton*, *supra*. The court responded by observing at p. 825-6:

"[t]he short answer to plaintiffs' argument is that federal exploration is not an alternative to the project, but merely another means of proceeding with the project so that the environmental consequences should be substantially the same in either case." We agree that federal exploration would present substantially the same environmental hazards as permitting private developers to explore the tracts sold. *An alternative which would result in similar or greater harm need not be discussed.* Plaintiffs' rejoinder to this response is that the separation of exploration from production is of great environmental importance since

information gained from exploration might result in modification or cancellation of the sale. The rejoinder remains unpersuasive since the continuing control which leasehold restrictions provide, gives Interior an equivalent right to prevent and control ecological detriment. (emphasis supplied).

The Decision is erroneous because it overlooks the rule cited by the court above in applying NEPA to other means of proceeding with Sale 40.

D. Notwithstanding Any EIS Deficiencies, Injunctive Relief Is Not Appropriate In This Case.

The *gravamen* of the Decision is that the Sale 40 EIS did not adequately consider the particular issues which the District Court felt were important. There is no major issue raised by the Decision on which the EIS is completely silent. The Department of Interior addressed the environmental consequences of Sale 40 and properly accorded more weight to some issues than others. As discussed above, NL is confident that the EIS meets the requirements of NEPA as interpreted by the appellate courts. If, however, there could be said to be technical deficiencies in the EIS in one form or another, it is clearly due to a good-faith difference regarding the emphasis that should have been placed on a particular issue. An error of this type, if indeed it is an error, is not sufficient to justify an indefinite delay in starting an important national energy supply project such as Sale 40.

The ability of the Federal government to control, on a continuing basis, the development of the OCS and to work with state and local governments in mitigating any onshore effects of OCS development must be considered in evaluating the sufficiency of the EIS and the appropriateness of a remedy for any EIS deficiencies. The U.S. Court of Appeals for the Fifth Circuit has noted this fact by stating that:

in a project such as this where developers sign leases and conduct separable operations over a period of months

and years, and where restrictions in those leases give the agency the ability to constantly control and adjust future action, this continuing control must be considered in determining the reasonableness of the impact statement. The MAFLA sale is a unique form of federal action. It does not involve a single undertaking or a project which becomes a *fait accompli* the day the decision to proceed is made. Because it contemplates numerous, successive lessor-lessee relationships involving activities over many areas and over many years, the agency's continuing opportunity for making informed adjustments has a major effect upon our evaluation of the sufficiency of the materials contained in the EIS itself.

Sierra Club v. Morton, supra at p. 827-8.

In the present case, the District Court apparently ignored the government's continuing control over development in assessing the relief necessary to protect against the inadequacies found in the Sale 40 EIS.

The District Court also failed to consider the national energy supply situation and, more particularly, the energy supply situation for the East Coast and North Central regions of the country. As a large consumer of energy, NL has become more than passingly familiar with the energy supply prospects for industrial plants. The natural gas situation on the East Coast is, in a word, grim. Under normal weather conditions, all of the major pipelines serving the East Coast and North Central regions were predicting increased curtailments this past winter. Columbia Gas Transmission Corporation, Texas Eastern Transmission Corporation and Transcontinental Gas Pipe Line Corporation² were predicting that little or no gas would be available for even high-priority, non-substitutable industrial uses for one or more months this winter. Federal Power Com-

² One or more of these pipelines supplies gas to Alabama, the District of Columbia, Indiana, Kentucky, Maryland, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia and West Virginia.

mission, News Release No. 22765 (December 9, 1976). Due to the unusually cold weather, however, almost all industrial customers on the East Coast and in the North Central region of the country experienced substantial curtailments and many were denied gas entirely. In order to maintain residential service and perhaps provide limited gas supplies for industrial service, Congress passed the Emergency Natural Gas Act of 1977, *supra*. Pursuant to this authority and existing FPC procedures, interstate pipelines serving the East Coast and the North Central regions have contracted for or agreed to transport on an emergency basis *at least* 120 billion cubic feet of gas since the beginning of the new year.³

Unfortunately, the experience this winter is a preview of winters to come unless and until new gas supplies are found. The attention given the cold weather masked the fact that many industries would have been without gas for prolonged periods even in normal weather. To NL's knowledge, no pipeline company serving the East Coast is predicting a material increase in gas supplies for the next few years. The future of industries and jobs which require natural gas will be severely impacted if the development of the mid-Atlantic OCS is postponed for another year or two while the Secretary prepares a speculative impact statement regarding transportation issues and alternative methods of developing the OCS.

Despite any finding of a technical violation of NEPA requirements, injunctive relief is in the discretion of the court and may be denied in particular circumstances. *Conservation Society Of Southern Vermont, Inc. v. Secretary*

³ The 120 Bcf figure is the result of a review of the emergency transportation and purchase arrangements of Columbia, Transco and Texas Eastern as well as Southern Natural Gas Company, Consolidated Gas Supply Corporation, Tennessee Gas Pipeline Company and Texas Gas Transmission Corporation. *Additional* volumes bought directly under the Emergency Natural Gas Act of 1977 and not requiring intrastate pipeline transportation are *not* included in this figure.

of Transportation, 508 F.2d 927, 933-4 (2d Cir. 1974). Since the environmental concerns of local communities can be adequately protected in future proceedings, the equities in this case heavily favor allowing exploration to commence on the Sale 40 leases. The future energy needs of the East Coast cannot be lightly dismissed. There is nothing to be gained and much to be lost by further delay. The essential purposes of NEPA have been fulfilled, and the national interest and the public welfare require that the injunction be lifted and Sale 40 declared valid.

IV. CONCLUSION

For the foregoing reasons, NL submits that the Decision entered by the District Court for the Eastern District of New York in dockets 75 C 208 and 76 C 1229 should be reversed. At a minimum, the Decision's declaration that Sale 40 leases are null and void and the injunction regarding further exercise of rights granted by Sale 40 must be set aside in the interest of all East Coast consumers of refined petroleum products and natural gas.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I have this 25th day of March, 1977, served the foregoing document upon the following parties by depositing same in the U.S. mails, properly addressed and postage paid.

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